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Testimony of
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Before the Labor & Public Employees Committee Hartford, CT
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Testifying in support of
House Bill 6594: An Act Concerning Noncompete Agreements

Senator Kushner, Representative Sanchez, Senator Sampson, Representative Ackert and members of the Labor & Public Employees Committee:

My name is Rachel Arnow-Richman and I am the Rosenthal Chair in Labor and Employment Law at the University of Florida. I have been a professor of law for over twenty years and have taught, researched, and written extensively about the law of noncompete enforceability. Prior to entering academica I was a management-side attorney, representing business clients in labor and employment law. I support HB 6594.

1. Employers overuse noncompetes causing adverse effects to the economy.

Noncompetes impose three harms: (1) they impede the mobility of the restrained worker; (2) they limit competitor firms' access to necessary labor; and (3) they deprive the public of the benefit of the restrained worker's services. For this reason, noncompetes were once voided outright. Current common law, however, permits so-called "reasonable" noncompetes. The historical basis for this exception was the belief that noncompetes were used only in exceptional situations involving high-level employees with unique access to proprietary information. It was thought they were too rare to have measurible impact on the economy.

These assumptions, however, have been debunked by empirical research, revealing that noncompetes are ubiquitous and have demonstrable negative effects. Data shows that forty percent of workers have signed a noncompete at some point, including many who do not hold a college degree and are unlikely to have access to proprietary information. Noncompetes depress wages, both for those who sign and in the broader labor market. They cause "brain drain" as restrained workers leave the state or their fields. They deter would-be entrepreneurs and stifle firm entry. The result of these and other empirically demonstrated effects is a reduction in innovation and regional economic growth.

2. Legislation is necessary to define the permissible bounds of noncompete use and penalize abuse.

This new research demands revision to existing law. Current law ostensibly will not enforce noncompetes that do not further a legitimate business interest or are overbroad in scope. But

current law does nothing to prevent employers from imposing unnecessary or overbroad noncompetes *that are unlikely to ever be tested in court*.

Most workers have limited knowledge of the law and are risk averse. Few can take the chance of leaving their job only to be sued by their former employer and potentially enjoined from working in their field. This means workers will decline outside offers and/or limit their own job search behavior out of fear of enforcement *even if their noncompetes are legally unenforceable*. Meanwhile other companies are reluctant to hire workers who have signed a noncompete due to the possibility of litigation by the former employer. The outcome of such litigation is highly uncertain due to the unpredictability of the common law's vague and fact-dependent "reasonableness" standard. Even if the court ultimately declines enforcement, the litigation will be costly and delay the hiring company's ability to fill its open position.

HB 6594 addresses these problems by clarifying existing law, appropriately penalizing noncompete abuse, and, based on the prior text introduced last year, providing meaningful access to the courts for restrained workers. Specifically, the bill:

(a) Prohibits noncompetes that serve no legitimate business purpose. HB 6594 creates a minimum salary threshold. Workers in low-wage jobs are highly unlikely to have access to proprietary information or maintain the type of customer goodwill required for an enforceable noncompete. They are also especially likely to lack knowledge of their rights, the bargaining power to refuse to sign a noncompete, and the resources to risk a lawsuit. The bill appropriately bans these noncompetes categorically.

(b) Prohibits facially overbroad noncompetes. HB 6594 caps the duration and scope of enforceable noncompetes. Even in situations where the employer has an interest that would justify a noncompete, that interest is likely to dissipate over time. The bill therefore limits the duration of a restraint to one year in most cases. The bill also confines the reach of restraints to the geographic area where the employee actually worked and to the type of work the employee actually performed. In this way the bill prohibits facially overbroad agreements that are likely to deter lawful competiton.

(c) Encourages employers to draft noncompetes narrowly and penalizes abuse. Employers currently incur *no consequence* for imposing an unenforceable or overboard noncompete. In fact, current law encourages employers to overreach by permitting courts to modify overbroad noncompetes. Employers can benefit from the deterrent effects of these agreements and trust that at least some of the agreement will be enforced if tested in court. HB 6594 eliminates this practice by disallowing partial enforcement of a noncompete and imposes statutory penalities on these employers.

(d) Grants restrained workers meaningful access to the courts. Currently a worker who is bound by a noncompete faces all of the risks and costs of possible litigation. If the worker takes a chance and is sued, the court *may* strike or at least reduce the restraint. But the worker will still incur attorneys' fees and likely lose out on the career opportunity that prompted his or her departure in the first place. Assuming the final version HB 6594 contains the same language as last year's bill, HB 6594 will resolve this problem by enabling the aggrieved worker to recoup costs and fees and receive damages in compensation for these losses.

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3. HB 6594 strikes the right balance between individual business interests, worker protection, and free competition.

Despite these changes, HB 6594 recognizes that companies may legitimately need to restrict competition. It does note impose a total ban on noncompetes as some states have proposed. The bill also leaves intact other methods currently available to employers for protecting information and retaining employees:

(a) The bill permits reasonable noncompetes. The bill preserves employers' ability to use noncompetes in nearly all of the same circumstances permitted by existing law. The bill's substantive provisions primarily clarify what is "reasonable" under common law. Companies are still able to use noncompetes with higher-level employees who meet the bill's salary threshold if they draft within the appropriate bounds. They are further permited to draft beyond these bounds provided they compensate the employee.

(b) Other restrictive covenants are expressly preserved. The bill affects only noncompetes and allows employers full use other types of restrictive covenants, including nondisclosure, non-solicitation, training repayment, and forfeiture-for-competition clauses.

(c) Trade secret law remedies employee abuse of proprietary information. Employers can continue to pursue relief for any misappropriation of trade secrets through state and federal statutory law. Trade secret law directly prohibits a worker from using proprietary information without preventing that worker from competing with a prior employer and provide employers adequate remedies for violations.

(d) Employers can protect their human capital by offering competitive terms of employment. Even under existing law, noncompetes may not be used merely to retain workers, but only to protect proprietary business interests. Employers can continue to fairly compete for and retain talent by offering attractive wages and benefits, opportunities for training and advancement, and other positive terms and conditions of employment that will enable it to attract and keep quality employees.

Lastly, limiting noncompetes is not a pure loss for business. The bill *positively* impacts business in several ways:

(a) Benefits to individual employers. Limiting noncompetes will give businesses greater ability to hire experienced talent by freeing some workers who would otherwise have been precluded from employment as a result of a noncompete.

(b) Benefits to broader business interests. Limiting noncompetes encourages economic growth, increases firm entry, and promotes innovation, among other economic benefits. While a particular employer may have incentives to restrain its own employees, the economy as a whole is better off when employees and information can move freely between firms.

For all of these reasons, I urge the adoption of HB 6594.